Wireless Access Charges

WT Docket No. 01-316

Sprint

May 21, 2002

Legal Overview

- The Communications Act permits all carriers to charge reasonable prices for the provision of communications services.
- Wireless carriers provide exchange access services to IXCs.
- Wireless rates for access services are unregulated.
- The existing regulatory regime is CPNP.
- The Commission should not discriminate between similarly situated parties.
- AT&T's refusal to pay does not create a binding industry standard.
- IXCs have a remedy if wireless rates are too high.

Wireless Carriers Are Entitled to Charge for Services Rendered

- Under the Communications Act, wireless carriers are entitled to charge for services rendered.
- Section 201(a) requires all common carriers to provide services upon a reasonable request.
- Section 201(b) requires all common carriers to set just and reasonable rates for the provision of such services.
- If the rates charged by the wireless carrier are not just and reasonable, AT&T has a remedy under Section 208.

Wireless Carriers Are Currently Providing Exchange Access Service to IXCs

- The FCC has held that wireless carriers provide exchange access service: "[M]any CMRS providers (specifically cellular, broadband PCS and covered SMR) also provide telephone exchange service and exchange access as defined by the 1996 Act." *Implementation of the local Competition Provisions in the Telecommunications Act of 1996,* First Report and Order, CC Docket 96-98. paragraph 1012; *id.*, paragraph 1004, ("Congress recognized that some CMRS providers offer telephone exchange and exchange access services.").

- AT&T does not deny wireless carriers provide terminating access. AT&T would be unable to provide service to its customers without access to the Sprint wireless network.

Wireless Rates for Exchange Access Service are Not Regulated

- Acknowledging the competitive nature of wireless services, the FCC eliminated regulation of wireless access charges, along with the charges to their end user customers and operator services. *In the Matter of implementation of Sections 3(N) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Second Report and Order 9 F.C.C.R. 1411, paragraphs 173 - 179 (March 7, 1994).

- "[W]e will forbear from requiring or permitting CMRS providers to file tariffs for interstate service offered directly by CMRS providers to their customers. **We also will temporarily forbear from requiring or permitting CMRS providers to file tariffs for interstate access service. At this time, because of the presence of competition in the CMRS market, access tariffs seem unnecessary.**" Id. at paragraph 179.

- The FCC has never suggested that wireless carriers should not be compensated for providing services to third parties.

Calling Party's Network Pays (CPNP) Is the Existing Regulatory Regime

- Calling Party's Network Pays (CPNP) arrangements "are clearly the dominant form of interconnection regulation in the United States and abroad." *In the matter of Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rule Making, paragraph 9.

- "Existing access charge rules and the majority of existing reciprocal compensation agreements require the calling party's carrier, whether LEC, IXC or CMRS, to compensate the called party's carrier for terminating the call." *Id.*

- Under the Commission-ordered CPNP regulatory structure, AT&T is required to compensate carriers that terminate traffic for it. **AT&T does, in fact, compensate every type of carrier that provides terminating services to it -- with the exception of wireless carriers.**

Wireless Carriers Need Not Obtain Prior Commission Approval To Collect Access Charges

- The collection of access charges by wireless carriers without express FCC authorization is lawful, and not *per se* unreasonable.
- Courts have rejected the notion that "every time a carrier seeks to start a new service over existing facilities it must petition the Commission . . . ." *MCI Telecommunications Corp. v. FCC*, 561 F.2d 365, 376 (D.C. Cir. 1977) (Execunet 1). Instead, the Communications Act contemplates a system of carrier initiated rate charges which the Commission could set aside in the manner prescribed by section 208 of the Act.
- Simply stated, "[t]he Communications Act of 1934 . . . does not require carriers to obtain the approval of the Commission before making changes in their rates." *AT&T v. FCC*, 487 F.2d 865, 871 (2nd Cir. 1973). In this case, the court reversed a plan by the FCC to require AT&T to obtain "special permission" to modify its rates and services prior to amending its tariffs. Similarly, special permission is not required for CMRS providers to charge and collect access charges.
- If regulated carriers are not required to obtain special permission, then certainly unregulated carriers do not require special permission to charge for the services they provide.

History Of Wireless Interconnection And Access Rates

- Original wireless scheme assigned one license to local wireline company and one to non-wireline company.
  - ILECs imposed very high, one way interconnection fees – which were a wash between ILECs and their affiliates, but constituted very significant costs for competing wireless firms, with two effects:
    - Raised rival's costs, and thus kept wireless rates relatively high;
    - Prevented wireless from threatening local wireline monopoly.
- Government intervention was necessary both to require that interconnection fees be reciprocal and that they be reasonable. *See, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report and Order, 11 FCC Rcd 15499, 16044-45 (1996) (LEC refusal to pay reciprocal compensation was a violation of 47 C.F.R. 20.11).
- This history of one-way payment explains in part why CMRS access charges are a recent phenomenon, but another factor is equally important – until recent years, with longer battery life and lower wireless prices, relatively few calls were placed to wireless customers.
- Only recently have wireless carriers received the information necessary to monitor and bill incoming exchange access traffic.

The Commission Must Generally Accord the Same Treatment to Similarly Situated Parties.

- It is axiomatic that wireless carriers must be accorded the same treatment as other providers of exchange access. *See Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C.Cir. 1965). When the Commission chooses to deviate from this tenet, "it must explain its reasons and do more than enumerate factual differences, if any, between [similarly situated parties]; it must explain the relevance of those differences to the purposes of the Federal Communications Act." *Id.* at 733.

- "*Melody Music* and its progeny appropriately recognize the importance of treating parties alike when they participate in the same event or when the agency vacillates without reason in its application of a statute or the implementing regulations." *New Orleans Channel 20, Inc. v. F.C.C,*. 830 F.2d 361 (D.C. Cir. 1987)

AT&T's Refusal to Pay Does Not Create a Binding Industry Standard

- Wireless carriers were traditionally required to make exceptionally high payments to other carriers to accept traffic from them, but the Commission recognized that this had the purpose and effect of harming consumer welfare and moved to control it.

- AT&T now makes a similar argument that it should not be required to pay for services rendered because it has managed to avoid paying for them to date.

- By avoiding CMRS access charge payments, AT&T has effectively transferred the cost of providing access service from AT&T to Sprint's customers.

- Other IXCs were paying for access services until they became aware of AT&T's refusal to pay through Sprint's court challenge.

Market Negotiations Cannot Resolve This Issue Without FCC Action

- Until the FCC confirms that wireless carriers are entitled to charge for the service they provide, AT&T will have no incentive to negotiate any arrangement with Sprint.

- Sprint has no current ability to block AT&T's traffic. Even if it possessed the technical ability to block AT&T, the Commission has acknowledged that use of such refusal sot exchange service as a bargaining tool would degrade the country's telecommunications network. *See, In the Matter of Access Charge Reform,* Seventh Memorandum and Order, CC Docket No. 96-262 (April 27, 2001) paragraph 24.

- The FCC should not confuse the mechanism of enforcement with the right to compensation.

AT&T Has a Remedy if it Believes Sprint's Rates are not Just and Reasonable

- In the CMRS Second Report and Order the FCC found that there was sufficient competition in the CMRS market place to forbear from imposing tariff requirements.

- In so holding the FCC noted: "In the event that a carrier violated Section 201 or 202, the Section 208 complaint process would permit challenges to a carrier's rates or practices and full compensation for any harm due to violations of the Act." *In the Matter of implementation of Sections 3(N) and 332 of the Communications Act Regulatory Treatment of Mobile Services,* Second Report and Order 9 F.C.C.R. 1411, paragraph 176 (1994).

Policy Overview

Policy Considerations

- Wireless carriers offer a chance for real, facilities-based competition in the consumer market.
- Wireless carriers are competitively disadvantaged if they are prohibited from collecting reasonable access charges while ILEC competitors are permitted to collect such charges.
- The fact that wireless carriers recover costs from their end users is not a justification for discriminatory treatment any more than per minute pricing precluded receipt of reciprocal compensation.
- There is not a "bill and keep" relationship with IXCs.
- Future policy considerations should not, and cannot, be used to justify discriminatory treatment under the current regime.

Discrimination Against Wireless Carriers Will Inhibit Competition

- The Commission, and specifically Chairman Powell, has articulated a vision of intermodal competition. Wireless networks represent one of the best opportunities for widespread, full facilities-based competition in the local exchange market.

- If the Commission denies wireless carriers access charge recovery, it would impose different costs on competing carriers.

  - such a policy would favor one type of subscriber - local wireline consumers - over another - local wireless consumers.

- As explained above, the Commission may not arbitrarily impose differential costs on similarly situated firms.

Sprint has not Recovered its Costs from its End-User Customers

- AT&T argues that Sprint has already recovered its costs of providing exchange access to AT&T because Sprint already charges its end user customers on a metered basis. This argument is flawed on multiple levels:
  - In a Calling Party's Network Pays environment, the rates charged to end users are irrelevant. Access charges are a matter of intercarrier compensation. The application of per minute of use charges is no more relevant in the access context than it was in the arena of reciprocal compensation.
  - CLECs and ILECs recover costs from their end user customers and no regulatory authority has suggested that they should not also be compensated for providing exchange access.
  - It is literally not true. Sprint has charged for and received payment for providing access services.

IXCs Do Not Offer "Bill and Keep" to Wireless Carriers

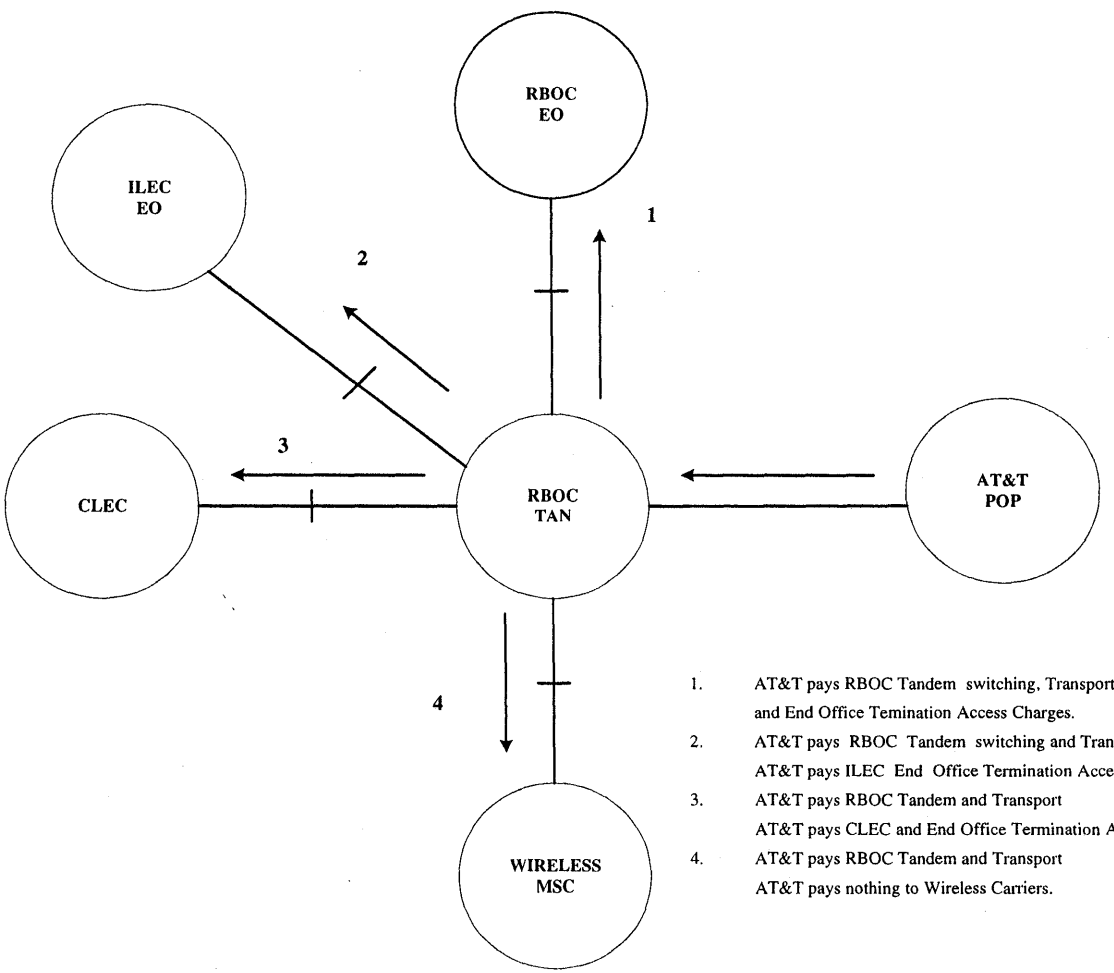
- Bill and Keep is the mutual exchange of services. The Act describes "Bill and Keep" as "the mutual recovery of costs through the offsetting of reciprocal obligations." *47 U.S.C.* 252(d)(2)(B)(i).

- The FCC has determined that "Bill and Keep" can only be imposed if "the amount of local telecommunications traffic from one network to the other is roughly balanced with the amount of local telecommunications traffic flowing in the opposite direction, and is expected to remain so. . .." 47 C.F.R. 51.713(b).

- AT&T provides no services to Sprint. The relationship is entirely one way. Indeed, wireless carriers currently pay IXCs to carry traffic for them, and pay ILECs terminating access charges. AT&T is unwilling to accept wireless traffic without compensation.

- "Bill and Keep" as defined by AT&T simply means wireless end users should pay for the cost of all calls that either originate or terminate to them.

AT&T Proposed Compensation Regime



1. AT&T pays RBOC Tandem switching, Transport and End Office Temination Access Charges.
2. AT&T pays RBOC Tandem switching and Transport
   AT&T pays ILEC End Office Termination Access Charges.
3. AT&T pays RBOC Tandem and Transport
   AT&T pays CLEC and End Office Termination Access Charges.
4. AT&T pays RBOC Tandem and Transport
   AT&T pays nothing to Wireless Carriers.

Future Policy Changes Do Not Justify Discrimination Under Current Policy

- While Sprint supports the long term implementation of a bill and keep regime, both Sprint and AT&T have acknowledged that there are multiple problems associated with a bill and keep regime in the access charge arena.

- The FCC has long recognized that the access charge policy creates inefficiencies, but there is no basis for the automatic conclusion that excluding a subset of industry participants will improve welfare.

- There is no policy justification for eliminating the revenue side of the CPNP system for wireless carriers while continuing to impose the expense side of the CPNP system.

The FCC Can Create a Prospective Safe Harbor if Deemed Appropriate

- In the Access Charge Reform Seventh Report and Order revising the application of access rates by CLECs, the Commission established certain safe harbors for CLEC access rates.

- If the FCC decides to pursue a safe harbor for wireless carriers (despite the fact that wireless carriers are charging substantially less than most CLECs were charging in the previous complaint cases), it can do so. In doing so, however, it should acknowledge the cost differences between wireline and wireless service.

Response to the District Court

- The FCC should inform the Court that wireless carriers provide exchange access service and are entitled to be compensated for providing such services (question 1 of the court's primary jurisdiction referral).

- The FCC should further inform the Court that wireless rates for exchange access service are not regulated, but that Sprint's rates are comparable to the previously approved CLEC safe harbor.

- On a going forward basis, the FCC could set a safe harbor for wireless access rates, just as it did for CLEC access rates.

- If, after this decision, AT&T desires to challenge the rates charged by Sprint, it is free to do so in a separate proceeding.